Supreme Court, U.S.
FILED
JAN 6 1992
OFFICE OF THE CLERK

No. 91-159

In The

Supreme Court of the United States

October Term, 1991

IN RE ALAN J. and MARY FRANCES ANTWEIL, husband and wife, HOBBS PIPE & SUPPLY, a general partnership, and MORRIS R. ANTWEIL,

Debtors.

WILLIAM BARNHILL,

Petitioner,

v.

ELLIOT JOHNSON, Trustee,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY BRIEF

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SUMMARY OF THE ARGUMENT

The Bankruptcy Code is a comprehensive federal statutory framework for debtor relief. The question presented in this case is one dealing with a time period which is an integral part of that legislative framework, the 90-day preference period under 11 U.S.C. § 547(b). The determination of whether a particular transfer, such as the payment by check in this case, falls within or outside of the 90-day period is a question of federal law under the federal statute.

Both parties agree that the language of 11 U.S.C. § 547, by itself, does not fully resolve the question of the date of transfer where payment is by check. Respondent Trustee, however, contends that Section 547 is clear and unambiguous, and that an analysis under 11 U.S.C. § 547(e) requires reference to state law to resolve the question of the effective date of transfer. The Trustee further argues that, by referring to the Uniform Commercial Code § 3-409, the date the check is honored by the bank must apply as the effective date of transfer.

The Trustee's argument ignores the language of § 547(e)(2) that if a transfer is perfected within ten days, the transfer is deemed to have been made at the time the transfer takes effect between the transferor and the transferee. The legislative history of Section 547, modern commercial practice, the Uniform Commercial Code and state law support a conclusion that, when payment is made by check, the transfer takes effect as between the debtor/transferor and the creditor/transferee on the date the check is delivered by the debtor to the creditor.

Further, the adoption of a date of delivery rule for purposes of § 547(b) is consistent with congressional intent to create a more modern, efficient framework for debtor relief. Unlike a date of honor rule, the date of delivery rule does not modify the scope of the 90-day preference period nor limit the provisions of the Code relating to transfer. Adoption of a date of delivery rule for § 547(b) does not create inconsistencies through application of a different rule to different subsections of § 547 depending on which party bears the burden of proof. Last, a date of delivery rule is in harmony with the policies underlying the Code and the drafter's intent to conform bankruptcy practice to modern commercial practice and to create an efficient, uniform federal framework for debtor relief.

ARGUMENT

The bankruptcy laws are a complex, comprehensive statutory framework for debtor relief which were intended to have uniform application throughout the United States. *McKenzie v. Irving Trust Co.*, 423 U.S. 365, 369-70, 65 S.Ct. 405, 407-08, 89 L.Ed. 305 (1945); H.R. Rep. No. 595, 95th Cong., 1st Sess. 1, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963. The Bankruptcy Reform Act of 1978 was enacted to modernize the bankruptcy law. S.Rep. No. 989, 95th Cong., 2nd Sess. 1, *reprinted in* Collier on Bankruptcy, App. 3 at V-1 (15th Ed. 1991). The overall objectives of the Bankruptcy Code are to give the debtor a less encumbered "fresh start" after bankruptcy, to make bankruptcy procedures more efficient, and to balance more equitably the interests of

different creditors. S.Rep. No. 1106, 95th Cong., 2nd Sess. 1, *reprinted in* Collier on Bankruptcy, App. 3 at VI-1 (15th Ed. 1991).

The question presented in this case is a question requiring construction of one of the provisions of the comprehensive framework of the Bankruptcy Code, the preference section in 11 U.S.C. § 547.

I. THE QUESTION PRESENTED IS A QUESTION OF FEDERAL LAW REQUIRING STATUTORY CONSTRUCTION

The Trustee contends that the provisions of 11 U.S.C. § 547 are clear and unambiguous and, therefore, there is no need for statutory construction in this case. The question presented, however, cannot be resolved based solely on the language of the statute.

The question of when a transfer occurs for purposes of an action to avoid a preference under 11 U.S.C. § 547 is a question of federal law arising under a federal statute. *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369-70, 65 S.Ct. 405, 407-08, 89 L.Ed. 305 (1945); *Official Unsecured Creditors Committee of Belknap, Inc. v. Shaler Corp (In re Belknap, Inc.)*, 909 F.2d 879, 881-82 (6th Cir. 1990). In construing a federal statute, the initial inquiry is whether, examining the language of the statute, Congress has spoken on the subject matter. *Norfolk and Western Railway Co. v. American Train Dispatchers Ass'n.*, ___ U.S. ___, 111 S.Ct. 1156, 1163, 113 L.Ed.2d 95 (1991). If the matter is not addressed by the plain language of the statute, then the question must be resolved by resort to sources extrinsic to the statute

itself, including the legislative history. The statute primarily should be construed to give effect to legislative intent. *Blum v. Stenson*, 465 U.S. 886, 894-95, 104 S.Ct. 1541, 1547, 79 L.Ed.2d 891 (1984).

Both sides in this case agree that the question presented cannot be resolved solely by the language of 11 U.S.C. § 547. Congress has not, in the language of the statute, itself, clearly addressed the subject matter. Therefore, the question presented by the case, the effective date of transfer when payment is by check, must be resolved by resort to sources extrinsic to Section 547, itself, including the legislative history which discloses congressional intent in enacting the statute.

II. STATUTORY CONSTRUCTION OF SECTION 547 SUPPORTS A DATE OF DELIVERY RULE

The Trustee relies primarily on the language of 11 U.S.C. § 547(e)(1) and Uniform Commercial Code (U.C.C.) § 3-409 to argue that the effective date of transfer for purposes of 11 U.S.C. § 547(b) should be the date of honor by the bank when payment is made by check. The Trustee's position that a date of honor rule should apply because, under U.C.C. § 3-409, a check does not act as an assignment of funds in the hands of the bank ignores the language of 11 U.S.C. § 547(e)(2)(A), that, if the transfer is perfected within ten days, the time of transfer relates back to the date the transfer is effective between the transferor and the transferee.

A. "EFFECTIVE TRANSFER" UNDER 547(e) IS BETWEEN TRANSFEROR AND TRANSFEREE RATHER THAN THE BANK

11 U.S.C. § 547(e) defines the time when a transfer is made.[1] Section 547(e)(2)(A) states that a transfer is made "at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within ten days after, such time." Section 547(e)(1)(B) further provides that "a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee."

In cases decided under the former Bankruptcy Act, this Court has held that the nature and extent of an interest in property and whether a transfer of such an interest has been perfected are to be tested by state law. *Butner v. United States*, 440 U.S. 48, 54-55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979); *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369-70, 65 S.Ct. 405, 407, 89 L.Ed. 305 (1945);

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[1] Many courts have held that the provisions of 11 U.S.C. § 547(e) apply only to secured transactions. *See, e.g., Braniff Airways, Inc. v. Midwest Corp.*, 873 F.2d 805 (5th Cir. 1989); *Durham v. Smith Metal & Iron Co. (In re Continental Commodities, Inc.)*, 841 F.2d 527 (4th Cir. 1988). This case does not involve a secured transaction, and the question of whether § 547(e) is, or is not, limited to secured transactions has not been directly raised by the Petition. It is the Petitioner, William Barnhill's position that it is not necessary to resolve the question in this case. Regardless of whether the provisions of § 547(e) are applied directly to the check transaction in this case, or, as previously argued by Petitioner, applied by analogy to a secured transaction, the provisions of § 547(e) support a date of delivery rather than a date of honor rule.

Corn Exchange National Bank and Trust Co. v. Klauder, 318 U.S. 434, 436-37, 63 S.Ct. 679, 681, 87 L.Ed. 884 (1943).

Relying on this reference back to state law for determination of the nature of an interest in property and whether a transfer has been perfected, the Trustee argues that U.C.C. § 3-409 is determinative of both the date of perfection and the date of transfer in this case. The Trustee contends that, since under U.C.C. § 3-409, a check does not constitute an assignment of funds in the hands of the bank, there has been no transfer of an interest in property nor has the transfer been perfected until the bank honors the check.[2]

Section 3-409 of the U.C.C., however, is not determinative of the question presented in this case. The Petitioner does not dispute that, at the time the bank honors the check, a creditor on a simple contract could not acquire a judicial lien superior to the interest of the payee creditor and, therefore, transfer by check would be deemed to be perfected at that point. However, U.C.C. § 3-409 does not deal with effectiveness of the transfer between the debtor and the payee creditor but, instead, deals with the bank's liability. U.C.C. § 3-409 specifically states:

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[2] The Trustee argues that because there is no assignment of funds in the hands of the bank, there is no diminution or depletion of the bankruptcy estate and, therefore, no transfer of an interest in property. Most courts have rejected the "diminution of the estate" test, holding that a voidable preferential transfer exists if the requirements of 11 U.S.C. § 547(b)(5) are met. *See* Countryman, *The Concept of A Voidable Preference*, 38 Vand.L.Rev. 713, footnote 158 (1985).

> (1) A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and *the drawee is not liable* on the instrument until he accepts it. (Emphasis added.)

Focusing on the provision of the U.C.C. dealing with the bank's liability and arguing that the point at which the bank becomes liable is the effective date of transfer ignores the clear language of 11 U.S.C. § 547(e)(2)(A) that, if the transfer is perfected within ten days, the time of transfer relates back to when the transfer is effective between the transferor and the transferee. As set out below, the legislative history, the realities of modern commercial practice and state law, including the provisions of the Uniform Commercial Code, demonstrate that, as between the transferor and the transferee, the transfer is effective upon delivery of the check.

B. BETWEEN TRANSFEROR AND TRANSFEREE THE TRANSFER IS EFFECTIVE UPON DELIVERY OF THE CHECK

The Trustee contends that the legislative history should be ignored in this case and that the Uniform Commercial Code and general state law establish that a date of honor rule should apply. Contrary to the Trustee's position, however, since Congress has not spoken on the question presented in the clear language of the statute, to the greatest extent possible, the statute should be construed to give effect to congressional intent as expressed in the legislative history. *Blum v. Stenson*, 465 U.S. 886,

894-95, 104 S.Ct. 1541, 1547, 79 L.Ed.2d 891 (1984). Further, under the Uniform Commercial Code, modern commercial practice and state law, when payment is made by check, the transfer is effective between the transferor and transferee on the date of delivery of the check.

The intent of Congress that the effective date of transfer should be a date of delivery is set out in the Congressional Record. Both the House of Representatives and Senate statements indicated that the Congressional drafters considered the payment of a debt by means of a check to be the equivalent of a cash payment. 124 Cong. Rec. H11097 (Daily Ed. Sept. 28, 1978), *reprinted in* Collier on Bankruptcy, App. 3 at IX-102 (15th Ed. 1991); 125 Cong. Rec. S17414 (Daily Ed. Oct. 6, 1978), *reprinted in* Collier on Bankruptcy, App. 3 at X-29 (15th Ed. 1991).

Similarly, the Uniform Commercial Code and state law, including the law of New Mexico, recognize that, as between the drawer of a check and the payee, a debt is deemed to be paid as of the date when the drawer delivers the check to the payee.[3] Section 3-802 of the

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[3] The Trustee, in Respondent's Brief, raises a choice of law question regarding this case. (Brief for the Respondent, p.16, footnote 6). No question has previously been raised in these proceedings that the law of any state other than the State of New Mexico would apply to questions of state law in this case. It is also difficult to see how the law of any state other than New Mexico could apply. The Petitioner is a resident of New Mexico. (J.A. 21). The check at issue in this case was drawn by a New Mexico corporation on a New Mexico bank account. (J.A. 26). The check was similarly paid through a

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Uniform Commercial Code provides that unless otherwise agreed, where an instrument is taken for an underlying obligation, the obligation is *pro tanto* discharged if a bank is drawer, maker or acceptor of the instrument and there is no recourse on the instrument against the underlying obligor. Based on this provision and modern commercial practice, numerous states follow the rule that, where the check is honored, as between the drawer and the payee, the date of transfer relates back to the date of delivery of the check. *See, e.g., Spencer v. West Alabama Properties, Inc.*, 564 So.2d 425, 426-28 (Ala. 1990); *Harper v. K.N.W. Trucking Co.*, 725 P.2d 1066 (Alaska 1986); *Ivy v. American Road Ins. Co.*, 409 So.2d 549, 550-52 (La. 1981); *Terry v. Kemper Ins. Co.*, 390 Mass. 450, 456 N.E.2d 465 (1983); *R & S Investment v. Howard*, 95 Nev. 279, 593 P.2d 53 (Nev. 1979); *In re Foreclosure of First Resort Properties, Inc.*, 94 N.C.App. 99, 380 S.E.2d 124 (Ct. App. N.C. 1979); *Lakeway Co. v. Bravo*, 576 S.W.2d 926 (Ct. App. Tex. 1979).

The State of New Mexico specifically follows the rule that, when a check is paid upon presentation to the drawee bank, the debt of the drawer to the payee is deemed paid as of the date when the drawer delivers the check to the payee. *Regents of University of New Mexico v. Lacey*, 107 N.M. 742, 743-44, 764 P.2d 873, 874-75 (1988).

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New Mexico bank. (J.A. 26). To the best of Petitioner's knowledge, with respect to the claims against Petitioner, there are no contacts with any state other than the State of New Mexico. *See*, N.M. Stat.Ann. 1978, § 55-1-105 (Cum. Supp. 1991), providing that the U.C.C. as adopted by New Mexico governs commercial transactions having primary contacts with New Mexico.

Even though a check does not act as an assignment of funds in the hands of the bank, as between the parties to the transaction, a check does constitute an assignment under New Mexico law. *State v. Archuleta*, 82 N.M. 378, 381-82, 482 P.2d 242 (Ct. App.), *cert. denied*, 82 N.M. 377, 482 P.2d 241 (1971). As between transferor and transferee, when payment is made by check, the transfer is effective as of the date of delivery of the check under New Mexico law. *Regents of University of New Mexico v. Lacey*, 107 N.M. 742, 743-44, 764 P.2d 873, 874-75 (1988).

Section 547(e) provides that, if perfected within ten days, the time of transfer is the date the transfer is effective between transferor and transferee. The legislative history shows clear congressional intent that payment by check is the equivalent of a cash transaction, effective as of the date of delivery of the check. Under modern commercial practice and the laws of many states, including New Mexico, a debt which is paid by check is deemed to be paid as of the date of delivery of the check from debtor to creditor. The effective date of transfer between the debtor/transferor and the creditor/transferee is the date of delivery of the check.

III. A DATE OF DELIVERY RULE FURTHERS UNIFORM APPLICATION OF THE BANKRUPTCY CODE AND POLICIES

The Trustee argues that "the primary policy of the entire Bankruptcy Code is to promote equality of distribution among similarly situated creditors." (Brief for Respondent, p.30). Petitioner does not dispute that equality of distribution is one of the policies underlying the

Code. *See, Begier v. Internal Revenue Service*, ___ U.S. ___, 110 S.Ct. 2258, 2262 (1990). However, the Code was also enacted to create a uniform, federal framework for debtor relief which would modernize bankruptcy laws, make bankruptcy procedures more efficient and give debtors a less encumbered "fresh start." H.R. Rep. No. 595, 95th Cong., 1st Sess. 1, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963; S.Rep. No. 1106, 95th Cong., 2d Sess. 1, *reprinted in* Collier on Bankruptcy, App. 3 at VI-1 (15th Ed. 1991). Unlike a date of honor rule, the adoption of a date of delivery rule for Section 547(b) not only is in harmony with the policy of equality of distribution, but furthers uniform application of the bankruptcy laws in conformity with modern commercial practice.

In enacting 11 U.S.C. § 547(b), Congress drew an arbitrary 90 day "line" for avoidable preferences. Transfers which fall within the 90 day period prior to filing of the petition may be avoided, while transfers which fall outside the 90 day limit may not be avoided. *Yellowhouse Machinery Co. v. Mack (In re Hughes)*, 704 F.2d 820, 822 (5th Cir. 1983). Under the provisions of Section 547, the question of whether a transfer is within or outside the 90 day period focuses on the effective date of the transfer between debtor and creditor. 11 U.S.C. § 547(e)(2)(A). Under a date of honor rule, focus is shifted from actions between debtor and creditor to the actions of the bank, leaving the time the transfer is deemed to occur to the unpredictable process of bank collections.[4] A date of

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[4] Using a date of honor rule, it is possible that a transfer begun by the debtor prior to filing of the petition would not be

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delivery rule for Section 547(b), however, leaves intact the statutory framework of determining whether a transaction is within the 90 day time limit by focusing on the date of transfer between debtor and creditor. A date of delivery rule preserves the scope of the 90 day period enacted by Congress, in harmony with congressional policy of equality of distribution among creditors.

A date of delivery rule also furthers congressional intent to enact a uniform bankruptcy law with more efficient bankruptcy procedure. S.Rep. No. 1106, 95th Cong., 2d Sess. 1 *reprinted in* Collier on Bankruptcy, App. 3 at VI-1 (15th Ed. 1991). Adoption of a date of honor rule for the trustee's avoidance power in Section 547(b), while a date of delivery rule applies to the exceptions to those powers under Section 547(c) would result in a trustee having to prove the voidability of a transfer using one date, while a creditor would be required to prove the transfer is not voidable based on a different date. 11 U.S.C. § 547(g). Adoption of the date of delivery would create a singular rule for all of the provisions of 11 U.S.C. § 547, rather than a shifting rule based on the party bearing the burden of proof, thus advancing the congressional purposes of a uniform law with more efficient procedures.

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deemed to be effective until after filing if the bank honors the check without notice of the bankruptcy. The transfer, then, could no longer be a voidable preference made "on or within 90 days before the date of filing of the petition." 11 U.S.C. § 547(b)(4)(A).

The adoption of the date of delivery as the effective date of transfer when payment is made by check is consistent with congressional intent and furthers the policies underlying the Bankruptcy Code.

CONCLUSION

The legislative history of Section 547, modern commercial practice and state law, including the law of the State of New Mexico, recognize that, where a debt is paid by check, the effective date of transfer as between the debtor and creditor is the date of delivery of the check. It was clearly Congressional intent that the date of delivery rule apply to transfers under 11 U.S.C. § 547(b). The adoption of a date of delivery rule for § 547 is in harmony with Congress' adoption of a specific 90 day time after which a transfer of interest of the debtor in property would be deemed to be a preference. A date of delivery rule, unlike a date of honor rule, does not alter or modify the legislative framework created by the Bankruptcy Code. Further, a date of delivery rule furthers uniform consistent application of the provisions of the Bankruptcy Code across the United States, avoiding conflicting application of different rules for different subsections of § 547.

Therefore, the Petitioner, William Barnhill, would respectfully request that the Court adopt a date of delivery rule for purposes of 11 U.S.C. § 547(b), and reverse the decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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